These are the tentative rulings for civil law and motion matters set for Tuesday, October 14, 2014, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Friday, October 10, 2014. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

NOTE: Effective July 1, 2014, all telephone appearances will be governed by Local Rule 20.8. More information is available at the court's website, www.placer.courts.ca.gov.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

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1. M-CV-0057397 Thunderbolt Holdings Ltd, LLC vs. Morris, Thomas W.

Plaintiff's Motion for Substitution of Party Plaintiff is granted. "Unifund CCR, LLC a limited liability company" shall be substituted in this action as the party plaintiff in place of Thunderbolt Holdings Ltd., LLC, A Limited Liability Company.

2. M-CV-0061831 Javidan, Zohal vs. Gillespie, Christine, et al

Plaintiff's Motion to File Amended Complaint is denied without prejudice. Plaintiff's motion was filed and served with insufficient notice time. Moving papers must be filed and served at least 16 court days prior to the scheduled hearing date. Code Civ. Proc. § 1005.

3. S-CV-0027927 Walsh, Forrest, et al vs. William Lyon Homes, Inc.

Motion for Protective Order

Defendant William Lyon Homes, Inc.'s ("Lyon's") Motion for Protective Order to Quash "Apex" Deposition Supboena of Gary Galindo is denied.

When a plaintiff seeks to depose a corporate president or other high level official of corporate management, and the official moves for a protective order, "the trial court should first determine whether the plaintiff has shown good cause that the official has unique or superior personal knowledge of discoverable information." *Liberty Mutual Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282, 1289. If the plaintiff does not establish that the official has such

personal knowledge, the trial court should issue a protective order and first require that plaintiff obtain the necessary discovery through less intrusive means. *Id.*

Plaintiffs show that Mr. Galindo was a recipient of correspondence between plaintiffs and Lyon's Director of Customer Service regarding the alleged defects on plaintiffs' property, and deposition testimony of another witness in the case indicates that Mr. Galindo was personally involved in the purchase of the subdivision in question, and was personally notified of the severity of problems with plaintiffs' property. Accordingly, plaintiffs have established that Mr. Galindo may possess unique or superior personal knowledge of discoverable information, and a protective order is not warranted.

The parties shall meet and confer regarding an appropriate date for the deposition of Gary Galindo.

Motion to Compel Deposition of Scott Jones

Plaintiffs' Motion to Compel the Deposition of Scott Jones is granted.

Third party deponent Scott Jones has indicated that he will not comply with a deposition subpoena obligating him to appear and testify and produce documents on the grounds that he was not personally served with the subpoena. Plaintiffs adequately establish proper service and good cause for the requested discovery. Mr. Jones has failed to rebut the presumption of proper service in light of the detailed declaration of diligence provided by plaintiffs' process server.

The parties shall meet and confer regarding an appropriate date for the deposition of Scott Jones.

4. S-CV-0029671 Colby, Diane vs. Poidmore, Anthony, et al

The Motion to Set Aside Verdict has been continued on the court's own motion to October 24, 2014 at 1:30 p.m. in Department 3, to be heard by the Honorable J. Richard Couzens. A tentative ruling on this motion shall be posted on October 22, 2014.

5. S-CV-0031533 Coppedge, Steven vs. Vericrest Financial, Inc., et al

Defendant Citimortgage, Inc.'s Motion for Summary Judgment is continued to October 21, 2014 at 8:30 a.m. in Department 32 to be heard by the Honorable Mark S. Curry.

Defendant Vericrest Financial, Inc.'s Motion for Summary Judgment was continued by agreement of the parties to January 20, 2015 at 8:30 a.m. in Department 32 to be heard by the Honorable Mark S. Curry.

6. S-CV-0031959 Spann, William vs. CBM-96, LLC, et al

The two demurrers to second amended cross-complaint, motion to consolidate, two motions for protective orders and motion to compel are continued on the court's own motion to November 4, 2014 at 8:30 a.m. in Department 40.

With respect to the discovery motions, the court tentatively intends to appoint a discovery referee in this matter on its own motion per Code of Civil Procedure section 639(a)(5). Counsel are ordered to meet and confer on the identity of the referee and the issues presented by section 639(d). Parties will file and serve statements no later than October 28, 2014, identifying areas of agreement and disagreement. If the parties cannot agree on a referee, the statement is to be accompanied by a nomination of a referee together with a statement of his or her qualifications, rates, etc.

7. S-CV-0032679 International Fidelity Insurance Co. vs. Tolani, Tony, et al

Rulings on Objections to Evidence and Request for Judicial Notice

IFIC's Objections to Evidence are ruled on as follows: Objection Nos. 1-14 and 17 are sustained. Objection Nos. 15, 16, and 18-21 are overruled. Defendants' request for judicial notice is granted.

Ruling on Motion for Summary Adjudication

Defendants' Motion for Summary Adjudication is denied.

A party may move for summary adjudication if it contends that there is no affirmative defense as to one or more causes of action alleged in the complaint. Code Civ. Proc. § 437c(f)(1). A moving party has the initial burden of persuasion to show that there is no triable issue of material fact and he is entitled to judgment as a matter of law. Code Civ. Proc. § 437c(p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850. If moving party meets his initial burden, the burden shifts to the opposing party to show the existence of a triable issue of material fact as to the cause of action or defense. Code Civ. Proc. § 437c(p)(2). The trial court views the supporting evidence, and all inferences reasonably drawn therefrom, in the light most favorable to the opposing party.

Moving defendants assert that they are entitled to summary adjudication with respect to the sole remaining claim in this action, for interest on subject surety bonds from January 31, 2011 to November 16, 2012, referred to in this action as "*Burns* damages". Under *Burns v. Massachusetts etc. Ins. Co.* (1944) 62 Cal.App.2d 972, 975 (*Burns*), a surety may be liable for prejudgment interest even if the payment of interest causes the surety's total liability to exceed the amount of its bond. *Id.* at 975. When the payment of interest causes the surety's liability to exceed the face of the bond, interest accrues from the time payment from surety is due, as damages for the surety's own withholding rather than the principal's default. *Id.* at 975–976.

IFIC goes to great lengths to distinguish they types of surety bonds at issue in *Burns*, which involved an adult guardianship (now referred to as a conservatorship), and the surety bond at issue in this case, issued under Business and Professions Code section 11013.2 to protect purchasers of subdivision lots. However, IFIC offers no persuasive reason to find that the general proposition of *Burns* would not apply in this context. Further, *Burns* did not characterize prejudgment interest in excess of the penal sum of the bond as tort damages for bad faith actions of the surety. Rather, under *Burns*, when liability becomes fixed, and the surety fails to pay as required, interest begins to accrue from that date.

Moving defendants assert that IFIC will be liable for *Burns* damages if they can establish (1) the surety's liability on the bond; (2) the surety's failure to pay when payment was due; and (3) resulting damages. In *Burns*, the Court of Appeal held that interest would begin to accrue from one day after the filing of the remittitur in the companion action determining liability of the guardian, because that was the date when the obligation of the principal became fixed. It has been stated that a surety had no obligation to pay claimants until the principal's liability to the bond claimants is fixed. *Schmitt v. Insurance Co. of North America* (1991) 230 Cal.App.3d 245, 258. In *Schmitt*, the court found that the principal's obligation to pay the claimants was not fixed until the trial court entered default judgment against the principals. Some cases have held that where there is no dispute about the fact and amount of the principal's obligation to pay the bond claimant, payment may be due upon the filing of the complaint against the surety. *Pellas v. Ocean Acc. & Guar. Corp.* (1938) 24 Cal.App.2d 528, 537; *Lasky v. American Indemnity Co.* (1929) 102 Cal.App. 192, 198–199; Civ. Code § 3287.

Moving defendants assert that liability became fixed as of the date that IFIC received notice of termination of the underlying purchase and sale agreements. The court does not find adequate support for this contention. In a related action, a Receiver was appointed by the court to oversee the subject property for the benefit of creditors. Because Highlands could not meet its contractual close of escrow deadlines with the Tolani claimants, the Receiver was unable to convey title to the Tolani claimants free of the lien of the Bank of America lenders who had recorded a notice of default. The Receiver issued notice of termination of the defendants' purchase and sale agreements in January 2011, under the Receiver's power to terminate any agreement affecting the property that was not beneficial to the operation of the property or the receivership estate. At the time that the Receiver sent notice of termination of the agreements, defendants' action against the principal Highlands, IFIC, and RLI Insurance Company (co-surety) was pending. Defendants subsequently obtained a default judgment against Highlands on their breach of contract claim on July 18, 2011. Arguably, until the date that default judgment was entered, Highland's liability was not fixed such that prejudgment interest under the reasoning of *Burns* must begin to accrue. Accordingly, moving defendants are not entitled to adjudication of their claim that *Burns* damages are owed beginning January 31, 2011.

For an additional reason, summary adjudication may not be granted, as there are separate material factual disputes regarding defendants' damage calculations. *See Paramount Petroleum Corp. v. Superior Court* (2014) 227 Cal.App.4th 226, 241. Specifically, defendants have calculated their damages by crediting settlement payments received from co-surety RLI, as set forth in the settlement agreement attached as an exhibit to RLI's motion for order determining good faith settlement. However, the settlement agreement itself expressly stated that the

settlement payment amounts listed in the agreement were "illustrative only" and that final amounts would depend on actual interest accrued through the actual date of payment. The settlement agreement calculated interest only through February 15, 2012. The proposed settlement was approved on April 23, 2012, and there is no evidence to establish the actual date of payment, or the actual amounts received by the defendants. For this separate reason, defendants fail to establish entitlement to damages as requested.

Based on the foregoing, defendants' Motion for Summary Adjudication is denied.

8. S-CV-0033533 Davis, Thomas, et al vs. Ford Motor Company

Rulings on Objections to Evidence and Requests for Judicial Notice

The parties' respective requests for judicial notice are granted. Plaintiffs' objections to defendant's evidence are ruled on as follows: Objection Nos. 1 and 2 are sustained. Objections Nos. 3-7 are overruled.

Ruling on Motion for Summary Judgment

Defendant Ford Motor Company's ("Ford's") Motion for Summary Judgment is granted.

Summary judgment may be granted where there is no triable issue as to any material fact, and moving party is entitled to judgment as a matter of law. Code Civ. Proc. § 437c(c). Defendants moving for summary judgment bear the burden of persuasion that one or more elements of the causes of action in question cannot be established, or that there is a complete defense thereto. Code Civ. Proc. § 437c(p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850. If the moving party carries its initial burden of production to make a prima facie showing that there are no triable issues of material fact, the burden shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. *Id.*

Lyon argues that the applicable statute of limitations bars each of plaintiffs' claims, and that the economic loss rule separately bars plaintiffs' fraud-based claims. Plaintiffs assert that a four-year statute of limitations applies to each of their causes of action because they seek rescission of a written agreement, that the statute of limitations was tolled during the time that they were putative members of related class action complaints, and that the economic loss rule does not apply under the standard set forth in *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979. The undisputed material facts show that even if a four-year statute of limitations governed each cause of action, and even if cross-jurisdictional tolling applied, the statute of limitations would still bar each of plaintiffs' claims.

Plaintiffs do not dispute that the statute of limitations in this case began to run by no later than June 18, 2006, when they sold the subject vehicle. However, they argue that the statute of limitations was tolled as of January 8, 2010, when the class action complaint was filed in *Custom Underground v. Ford Motor Company*, United States District Court for the Eastern District of Illinois, Eastern Division, Case No. 1:10-cv-00127 ("*Custom Underground*"). It is undisputed that plaintiffs were putative members of the *Custom Underground* lawsuit based on the initial

complaint filed in that action. (Deft. SSUMF 78.) A limitations period may be tolled during the time that the plaintiff is a member of a related federal class action. *San Francisco Unified School Dist. V. W.R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1340.

However, on May 18, 2010, a first amended complaint was filed in the *Custom Underground* case. (Deft. SSUMF 79.) The amended complaint changed the definition of class members, restricting plaintiff class members to persons who had incurred documented expenses for engine replacement or engine repair after the warranty on that engine had expired. (Deft. SSUMF 80.) As of the date of the filing of the first amended complaint, the *Custom Underground* lawsuit excluded plaintiffs as potential members of the class, and therefore equitable tolling would no longer apply. It follows that, even assuming a four-year statute of limitations applies to each of the causes of action in the complaint, the statute of limitations ran by no later than October 26, 2010. The subsequent consolidation of several related class actions in April 2011 into a single action: *In re Navistar 6.0 L Diesel Engine Products Liability Litigation*, United States District Court for the Northern District of Illinois, Eastern Division, case no. 1:11-cv-02496, and preliminary certification of class on November 14, 2012, which would include plaintiffs, is irrelevant, as the statute of limitations had already expired as of October 26, 2010. As the complaint in this action was filed August 19, 2013, each of plaintiffs' claims is barred by the statute of limitations.

Based on the foregoing, Ford's Motion for Summary Judgment is granted.

9. S-CV-0033745 Lane, Teresa, et al vs. Wal-Mart Stores, Inc., et al

Rulings on Request for Judicial Notice and Objections to Evidence

Defendant Wal-Mart Stores, Inc.'s request for judicial notice is granted. Defendant's objections to evidence are sustained as to the last sentence of paragraph 11 of the Declaration of Sean D. Shimada, and otherwise overruled.

Ruling on Motion for Summary Judgment

Defendant's Motion for Summary Judgment is granted.

Summary judgment may be granted where there is no triable issue as to any material fact, and moving party is entitled to judgment as a matter of law. Code Civ. Proc. § 437c(c). Defendants moving for summary judgment bear the burden of persuasion that one or more elements of the causes of action in question cannot be established, or that there is a complete defense thereto. Code Civ. Proc. § 437c(p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850. If the moving party carries its initial burden of production to make a prima facie showing that there are no triable issues of material fact, the burden shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. *Id.*

Defendant asserts that plaintiffs' claim for premises liability cannot be established because no admissible evidence exists showing that a dangerous condition of defendant's property caused the subject accident leading to decedent Robert Cartas' injuries. Defendant's

moving papers satisfy its initial burden to make a prima facie showing that there are no triable issues of material fact, and the burden shifts to plaintiffs to show the existence of a triable issue. The primary evidence submitted by plaintiffs in opposition is the declaration of Sean D. Shimada, Ph.D., a biomechanist and bio-engineer. Dr. Shimada opines that Mr. Cartas' injuries were caused when he struck his left superior posterior head and upper thorax on the ground while his body was in an inverted position. Dr. Shimada concludes: "[t]he mechanical mechanism of the fall was a result of Mr. Cartas projecting forward and downward over his handlebars ... after the front wheel of his bicycle struck the manhole project/cover identified in the Roseville Fire Department scene photographs.

Dr. Shimada provides no foundation for the conclusion that Mr. Cartas struck the manhole project/cover. It is unclear how Dr. Shimada has arrived at this conclusion, so the statement appears to be based on speculation. Plaintiffs submit no other evidence to establish that Mr. Cartas struck the manhole project/cover. While plaintiffs argue that the alleged hazardous condition in this matter was the entire unpaved area situated between the two segments of asphalt paths shown in accident photographs, they have also submitted no evidence to establish that any portion of this area caused the accident. As plaintiffs have failed to establish the existence of a triable issue of material fact, summary judgment must be granted.

10. S-CV-0033888 Perkins, Christopher, et al vs. Royo, Afsaneh

Defendant's Motion to Continue the Trial Date is granted.

The trial date of November 17, 2014, and the correspondent dates, are vacated. This matter is set for further case management on January 6, 2015, at 10:00 a.m. in Department 40.

11. S-CV-0034649 Cain, Christopher A. vs. City of Roseville

Defendant City of Roseville's unopposed Demurrer to First Amended Complaint is sustained without leave to amend.

Plaintiff's first cause of action for general negligence against defendant fails to allege the statutory basis for the claim, and fails to allege the acts or omissions of defendant which allegedly caused damage to plaintiff. Plaintiff's second cause of action for intentional tort fails to allege the statutory basis for the claim, and fails to allege the acts or omissions of defendant which allegedly caused damage to plaintiff.

Plaintiff was previously given leave to amend to cure the defects in his complaint. Plaintiff bears the burden of demonstrating how the complaint may be amended to cure the defects therein. *Assoc. of Comm. Org. for Reform Now v. Dept. of Indus. Relations* (1995) 41 Cal.App.4th 298, 302. A demurrer shall be sustained without leave to amend absent a showing by plaintiff that a reasonable possibility exists that the defects can be cured by amendment. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. As the demurrer was unopposed, plaintiff has failed to make any showing that the first amended complaint can be amended to change its legal effect. Accordingly, the demurrer is sustained without leave to amend.

12. S-CV-0034949 Graser, David vs. Carapiet, Anita

Plaintiff's Motion for Leave to Amend Complaint is granted. The first amended complaint shall be filed and served by no later than October 31, 2014.

13. S-CV-0034953 Geryon Ventures, LLC vs. Slawsby, Denis R., et al

Appearance required. Defendant is advised that his notice of motion must include notice of the court's tentative ruling procedures. Local Rule 20.2.3(C).

Defendant's Demurrer to Complaint is overruled.

A demurrer tests the legal sufficiency of the pleadings, and raises issues of law, not fact, regarding the form or content of the complaint. *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994. A demurrer can only be used to challenge defects that appear on the face of the pleading under attack, or from matters that are judicially noticeable. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. No other extrinsic evidence may be considered. *Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881.

Defendant's demurrer is based entirely on unverified factual argument of counsel, outside of the four corners of the complaint. Defendant cites to case law providing that a pleading valid on its face may be subject to demurrer if the allegations are contradicted by exhibits attached to the complaint. *See Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604. Defendant mistakenly argues that the court may therefore consider unauthenticated exhibits that he has attached to his demurrer. While the "face of the complaint" may include exhibits attached to the complaint and incorporated by reference, there is no support for defendant's assertion that the court may, in ruling on a demurrer, also consider the validity and relevance of any other exhibits or other extrinsic evidence that defendant submits for consideration.

Defendant shall file an answer or responsive pleading by no later than October 31, 2014.

Defendant's request for telephonic appearance is granted. All telephonic appearances are governed by Local Rule 20.8.

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